

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 24

WCC No. 2008-2092

KURT VANDERVALK

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING MOTION TO QUASH SUBPOENAS *DUCES TECUM* AND
DENYING MOTION FOR PROTECTIVE ORDER

Summary: The State of Montana moved to quash two Subpoenas *Duces Tecum* which were issued by this Court and served upon it at Kurt Vandervalk's request. The State argues that the subpoenas were not served in accordance with ARM 24.5.331, that the discovery sought is unduly burdensome, and that the items requested bear no relationship to Vandervalk's petition in this Court. The State further moved for a protective order which would prohibit Vandervalk from serving additional subpoenas upon it. Vandervalk responds that he has a right to the information he seeks under Article II, § 9 of the Montana Constitution.

Held: Vandervalk's subpoenas are quashed as they were not served in accordance with ARM 24.5.331. Furthermore, even if re-served properly, the substance of Vandervalk's request is unduly burdensome upon the State and appears to largely seek information which is not relevant to his claim before this Court. However, the State's motion for a protective order is preemptive and overly broad and is therefore denied.

¶ 1 The State of Montana (State) moved to quash two Subpoenas *Duces Tecum* which were issued by this Court and served upon it at Petitioner Kurt Vandervalk's (Vandervalk) request, and further moved for a protective order to preclude Vandervalk from serving

future subpoenas upon it.¹ Vandervalk objects to the State's motion, arguing that he is entitled to the information sought and that it is relevant to his claim before this Court.²

¶ 2 In his April 8, 2009, Subpoena *Duces Tecum*, Vandervalk requested that the State produce:

All documents, books, records, notes, correspondence, DISTRUBTION [sic], USE, SIDE EFFECTS, COMPLAINS [sic] FILED OR RECEIVED, AND evidence concerning (VIOXX, REFECOXIB) from 1989 to present, unless quashed or until judgment, dismissal, or other final determination of this action by the court. . . .³

¶ 3 In his April 28, 2009, Subpoena *Duces Tecum*, Vandervalk requested that the State produce:

All books, records, documents, exhibits, evidences, complains [sic], correspondence, summaries, petitions, filings, reports and information in your possession, collected and or presented by the people of Montana concerning the drug (Vioxx/Refecoxib) distributed in the state of Montana from May of 1999, [u]nless quashed or until judgment, dismissal, or other final determination of this action by the court. . . .⁴

¶ 4 In its brief in support of its motion, the State asserts that the subpoenas which were issued were not in compliance with ARM 24.5.331(3), which requires that subpoenas be served by a person not a party to the action. The State alleges that Vandervalk personally served both subpoenas, which Vandervalk does not deny in his response to the State's motion. Under ARM 24.5.331(3), Vandervalk, as a party to the action, cannot serve a subpoena in the action. For that reason, the State's motion to quash is granted.

¶ 5 However, the State further argues that even if the procedural infirmity of Vandervalk's subpoenas were corrected, it would again ask this Court to quash the subpoenas on their merits. In the interest of judicial economy, I therefore address the State's arguments as to the merits of those subpoenas so as to avoid having the parties

¹ Montana Attorney General's Brief in Support of Motion to Quash Subpoena *Duces Tecum* and Protective Order (Brief), Docket Item No. 73.

² Response to Motion to Quash Subpoena *Duces Tecum* and Protective Order by the Montana Attorney Generals [sic] Office (Response), Docket Item No. 75.

³ Subpoena *Duces Tecum*, Docket Item No. 38.

⁴ Subpoena *Duces Tecum*, Docket Item No. 57.

reargue the motion to quash if Vandervalk were to re-serve the subpoenas in accordance with ARM 24.5.331(3).

¶ 6 The State sets forth two additional arguments why it believes Vandervalk's Subpoenas *Duces Tecum* should be quashed: (1) the production of the documents requested would be unreasonable, unduly burdensome, and oppressive because the State's documents are irrelevant to the proceedings in this Court, and the extraordinarily broad scope of the subpoenas would require expensive and time-consuming production of volumes of material; and (2) most of the subpoenaed documents are privileged because they were prepared for and are being used in active litigation. The State points out, however, that it is willing to direct Vandervalk to "some background and publicly available documents"⁵ as a courtesy.

¶ 7 The State argues that, while it is unclear as to the specific nature of Vandervalk's workers' compensation claim, its litigation documents are irrelevant as the pending litigation deals with marketing practices and Medicaid fraud and does not encompass the health reactions of specific individuals as side effects of the drug's use. The State further alleges that the documents Vandervalk has requested encompass twenty years' worth of documents comprised of millions of pages of information, much of which is not easily accessible because it is possessed by outside counsel.

¶ 8 As to the State's allegations that some of the material sought should not be produced because it is privileged, the State points to Mont. R. Civ. P. 45(c)(3)(A)(iii), which allows a court to quash a subpoena if it requires disclosure of privileged or other protected matter and no exception or waiver applies. The State argues that Vandervalk's request includes documents that were prepared in the course of ongoing litigation and constitute attorney work product, and that disclosure of these documents could jeopardize the State's case.

¶ 9 Vandervalk asserts that he is not seeking records from any other parties which were generated outside of Montana, but only records pertaining to:

1. recklessness [sic] distribution[.]
2. Lack of factual record keeping by pharmacies and physicians[.]
3. Complaints [sic] received by the state before 1-12-06 by victims, and health insurance companies involved with this defective drug, as well as complaints from Vandervalk.

⁵ Brief at 3.

4. When the state of Montana suspected these drugs, may be dangerous to personal health.⁶

¶ 10 Under Mont. R. Civ. P. 26(b)(1), parties may obtain discovery which is relevant to the subject matter involved in the pending action, even if the information sought is itself inadmissible but appears reasonably calculated to lead to the discovery of admissible evidence. Under Mont. R. Civ. P. 45(c)(1), a party responsible for the issuance of a subpoena must “take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.” I conclude that Vandervalk’s Subpoenas *Duces Tecum* served upon the State are unduly burdensome. Furthermore, the information Vandervalk seeks appears neither relevant to the claim before this Court nor reasonably calculated to lead to the discovery of admissible evidence. For those reasons, I conclude that even if Vandervalk were to correct the service of his subpoenas, I would nonetheless grant the State’s motion to quash them.

¶ 11 In addition to its motion to quash, the State further moved for a protective order to preclude Vandervalk from pursuing any discovery against the State in this proceeding. The State’s preemptive blanket request is overly broad. Although at this point in the present case I cannot conceive of any relevant discovery which Vandervalk may seek against the State, I likewise cannot rule out the possibility that some may exist. If Vandervalk seeks further discovery against the State which the State believes is improper, the State may pursue remedies in this Court including another motion to quash and possibly sanctions under ARM 24.5.326. At that time, the Court will reconsider the State’s request for a protective order if it chooses to renew its motion.

ORDER

¶ 12 The State’s motion to quash Subpoena *Duces Tecum* is **GRANTED**.

¶ 13 The State’s motion for a protective order is **DENIED**.

DATED in Helena, Montana, this 23rd day of July, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kurt Vandervalk
Greg E. Overturf
Kelley L. Hubbard

⁶ Response at 3.

Submitted: June 8, 2009